

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION**

STATE OF TEXAS;

STATE OF ALABAMA;

STATE OF ARKANSAS;

STATE OF KANSAS;

STATE OF LOUISIANA;

STATE OF NEBRASKA;

STATE OF SOUTH CAROLINA;

STATE OF WEST VIRGINIA,

GOVERNOR PHIL BRYANT, STATE OF MISSISSIPPI; AND

GOVERNOR PAUL R. LePAGE, STATE OF MAINE,

Plaintiffs,

vs.

UNITED STATES OF AMERICA, ET AL.;

Defendants,

And

KARLA PEREZ, ET AL.;

STATE OF NEW JERSEY,

Defendants-Intervenors.

Case No. 1:18-cv-00068

**PLAINTIFF STATES' RESPONSE TO
DEFENDANT-INTERVENORS' RENEWED REQUEST FOR DISCOVERY**

Plaintiffs take no position regarding Defendant-Intervenors' renewed request to present Stephen Legomsky as an expert witness and to depose the president of the USCIS union, Michael Knowles. *See* ECF Nos. 137, 138, 165. But the testimony of these two individuals is not necessary for the Court to decide the issues in front of it, so Defendant-Intervenors' request should not cause a delay in the briefing schedule on Plaintiff States' motion for a preliminary injunction.

The proposed testimony from these two witnesses purportedly relates to whether Federal Defendants exercise discretion in the granting of DACA applications. However, in questioning from this Court in the predecessor lawsuit challenging DAPA and Expanded DACA, Federal Defendants could not identify a single act of true discretion. Jan. 15, 2015 Hrg. Tr. at 102:13-103:18, *Texas v. United States*, No. 1:14-cv-254 (S.D. Tex.), ECF No. 106; *see Texas v. United States*, 86 F. Supp. 3d 591, 669 n.101 (S.D. Tex. 2015). And, as of September 2017, the Department of Homeland Security admitted that it could not identify a single act of discretionary denial. Pls.' Mot. for Prelim. Inj. Exh. 5 n.1 (App. 22-23), ECF No. 6. Defendant-Intervenors have not alleged how Mr. Legomsky or Mr. Knowles could rebut that admission or how they would have the necessary foundation to do so.

Additionally, the information Defendant-Intervenors seek through the requested testimony is not needed for the Court to decide the legal arguments before it. Plaintiff States offer three separate grounds for why DACA is unlawful. The question of discretionary denials plays no part in deciding the merits of whether DACA violates the Take Care Clause of the Constitution or the substantive

requirements of the Administrative Procedure Act (“APA”). Thus, this Court can resolve this case based on either of these two violations without even considering the issue of discretionary denials.

Further, the number of discretionary denials does not change the Court’s analysis of whether DACA violated the procedural requirements of the APA because it was issued without notice and comment. Fifth Circuit precedent dictates that DACA should have conformed with the APA’s notice-and-comment requirement because it altered recipients’ lawful presence and eligibility for attendant benefits. *Texas v. United States*, 809 F.3d 134, 176-78 (5th Cir. 2015). Neither Mr. Legomsky nor Mr. Knowles can provide any information to contradict those undisputed facts. Indeed, Defendant-Intervenors admit that DACA confers lawful presence and certain benefits upon DACA recipients. Proposed Def.-Intervenors’ Memo. of Law in Support of Mot. for Leave to Intervene 1-3, ECF No. 14. Thus, in deciding even the procedural APA claim, the issue before the Court is a legal one and remains entirely unaffected by any testimony from either Mr. Legomsky or Mr. Knowles. Accordingly, the testimony sought by Defendant-Intervenors is of no relevance to the issues in front of the Court.

Defendant-Intervenors have already caused delay twice—first in their request for discovery before the hearing on the motion for the preliminary injunction and second in their consent to New Jersey’s request for an additional extension, which allowed Defendant-Intervenors to complete additional discovery on the Federal Defendants. As noted in their response, Federal Defendants have timely produced

over 7,000 pages of documents responsive to Defendant-Intervenors' request for discovery. ECF No. 139 at 2-3. Defendant-Intervenors should have sufficient time to incorporate any of this discovery into the briefs due on the deadlines set by the Court, and any new testimony from these two witnesses could be timely incorporated into Defendant-Intervenors' response. So if the Court is inclined to grant the Defendant-Intervenors' request, Plaintiff States respectfully request that this Court maintain the current briefing schedule on their motion for a preliminary injunction.

July 20, 2018

Respectfully submitted.

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CERTIFICATE OF SERVICE

I certify that on July 20, 2018, this document was electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

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